SELVA KUMAR A/L MURUGIAH

v.

THIAGARAJAH A/L RETNASAMY

FEDERAL COURT, KUALA LUMPUR
TAN SRI DATO' HJ. MOHD AZMI KAMARUDDIN FCJ,
DATUK PEH SWEE CHIN FCJ,
DATO' WAN ADNAN ISMAIL FCJ
[APPEAL NO. 02-289-93]
16 FEBRUARY 1995

***CONTRACT**: Section 75 Contracts Act 1950 - Effect - Breach of contract - Reasonable compensation - Whether recoverable simpliciter - Whether loss or damage to be proved accordingly.*

***CONTRACT**: Section 75 Contracts Act 1950 - Phrase "whether or not actual loss or damage is proved to have been caused thereby" - Meaning of - Whether actual loss or damage need not be proved - Applicability - Whether restricted to cases where the Court found it difficult to assess damages for the actual loss or damage.*

***INTERPRETATION**: Section 75 Contracts Act 1975 - Construction - Principles - Literal contruction - Whether bound to produce unreasonable result - Whether Court to adopt a restricted and limited construction.*

***WORDS & PHRASES**: "whether or not actual loss or damage is proved to have been caused thereby".*

Both the parties herein were medical practitioners. In 1988 the respondent sold his medical practice to the appellant for a consideration of RM120,000, payable in several instalments, and for this purpose the parties had entered into an agreement in writing. The agreement inter alia contained a forfeiture clause for breach, to the effect that "in the event the purchaser shall default in his obligations herein all monies paid to date of such breach shall be forfeited absolutely to the vendor as agreed liquidated damages and thereupon this agreement shall be deemed null and void".

The appellant had paid a total of RM96,000 towards the purchase price, including RM12,000 earnest money upon the signing of the agreement, but had failed to pay the last 6 instalments totalling RM24,000. Henceforth, the respondent, by a letter dated 22 December 1989 terminated the contract and forfeited the whole of the sum thus paid as "agreed damages". The respondent then sought for a declaration that the said agreement was properly terminated and that he was in law entitled to the forfeiture in question. The learned Judge ruled in favour of the respondent and hence this appeal by the appellant.

Before the Federal Court the primary issues that arose were:

1. Whether, in interpreting s. 75 of the Contracts Act 1950, a restricted construction rather than a literal construction, ought to be adopted.

2. If so, whether, bearing in mind the forfeiture clause appearing in the contract herein, and having regard to the true effect of the said s. 75, it was open in the circumstances for the respondent to effectuate the said forfeiture.

Held:

[1] Section 75 of the Contracts Act 1950 ought to be given a restricted construction rather than a literal one. This is so notwithstanding that the words "whether or not actual damage or loss is proved to have been caused thereby" therein are unambigious and clear, and that the language used in the words expresses no circumcription of the area of operation. To give the section a literal construction would seem to be beyond the object of the section, which is to abolish the distinction between a penalty and liquidated damages. It will also produce a most unreasonable result in that it will change the existing law, which is that a plaintiff who seeks to recover damages for the actual damage caused ought to prove them, unless he is content with the symbolic award of nominal damages.

[2] The words "whether or not actual damage was proved to have been caused thereby" in s. 75 of the Contracts Act are limited to those cases where the Court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove damages or the reasonable compensation for the actual damage or loss in the usual ways.

[3] The precise attributes of such contracts in which it is difficult for a Court to assess damages for the actual damage or loss, are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote. In such cases the Court ought to award, not nominal damages, but substantial damages not exceeding the sum so named in the contractual provision, a sum which is reasonable and fair according to the Court's good sense and fairplay.

[4] Where there is inherently any actual loss or damage from the evidence or nature of the claim, and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the Court to award such damages, despite the words "whether or not actual damage was proved to have been caused thereby" in s. 75 of the Contracts Act.

[5] In the present case, the evidence clearly shows some actual loss, damages for which could be assessed by settled rules, as there was evidence that at the material time the appellant was already using the respondent's medical equipment. This is therefore an example where damages could be proved by settled rules, but evidence has not somehow been brought to prove damages for the said actual loss, as to enable the Court to award at least some damages as compensation for loss of use of the said medical equipment. The damages have not been proved, no compensation could be awarded in this respect.

[6] Quite apart from the real loss, which has not been proved, the respondent ought to be entitled to forfeit any reasonable amount of earnest money or deposit paid him under the contract. The RM12,000 earnest money herein, being only 10% of the purchase price, is not too large a sum to prevent it from being fully forfeitable. The respondent therefore must be allowed to forfeit that. In the premises, The sum of RM96,000, less the sum of RM12,000 earnest money, must be refunded to the appellant.

[Appeal allowed in part].

[**Bahasa Malaysia** Translation of Headnote]

***KONTRAK**: Seksyen 75 Akta Kontrak 1950 - Kesan - Kemungkiran kontrak - Pampasan yang munasabah - Samada patut diperolehi secara mudah - Kehilangan atau kerugian sebenar - Samada perlu dibuktikan.*

***KONTRAK**: Seksyen 75 Akta Kontrak 1950 - Rangkai kata " whether or not actual loss or damage is proved to have been caused thereby" - Maksud - Samada kehilangan atau kerugian sebenar tidak perlu dibuktikan - Penggunaanpakai - Samada terhad kepada kes-kes di mana Mahkamah mendapati sukar untuk menilai ganti rugi bagi kehilangan atau kerugian sebenar.*

***INTERPRETASI**: Section 75 Akta Kontrak 1950 - Pentafsiran - Prinsip - Penterjemahan literal - Samada membawa kepada rumusan yang tidak munasabah - Samada Mahkamah patut menggunakan penterjemahan terhad.*

***PERKATAAN & ISTILAH**: "whether or not actual loss or damage is proved to have been caused thereby".*

Kedua-dua pihak di dalam kes ini adalah pengamal perubatan. Pada tahun 1988 responden telah menjual perniagaannya kepada perayu dengan balasan sebanyak RM120,000, yang akan dibayar secara beransur-ansur, dan satu perjanjian bertulis telah dimeterai oleh mereka untuk tujuan ini. Perjanjian tersebut antara lain mengandungi klausa yang membenarkan rampasan kerana mungkir, yang berbunyi "sekiranya pembeli melakukan kemungkiran di atas obligasi-obligasinya di dalam ini maka semua wang yang telah pun dibayar setakat kemungkiran tersebut akan dirampas sepenuhnya oleh penjual sebagai "liquidated damages", dan pada ketika itu perjanjian ini akan dianggap sebagai menjadi mansuh dan terbatal".

Perayu telah membayar RM96,000 untuk pembelian di atas, termasuk RM12,000 wang cengkeram yang dibayarnya ketika menandatangani perjanjian, tetapi gagal membayar 6 bayaran terakhir berjumlah RM24,000. Berikutnya, melalui sepucuk surat bertarikh 22 December 1989, responden telah membatalkan perjanjian berkenaan sekaligus merampas, sebagai "liquidated damages", kesemua wang yang telah dibayar perayu. Responden kemudiannya memohon deklarasi bahawa pembatalan perjanjian olehnya itu adalah teratur dan bahawa beliau berhak di sisi undang-undang kepada rampasan di atas. Yang Arif Hakim memberikan perisytiharan seperti yang dipohon dan kerana itu perayu telah merayu.

Di hadapan Mahkamah Persekutuan isu penting yang timbul ialah:

1. Samada, dalam mentafsir s. 75 Akta Kontrak 1950, terjemahan yang literal tidak patut dipakai dan sebaliknya satu terjemahan yang terhad atau terbatas hendaklah digunapakai.

2. Jika begitu, samada, mengambil kira peruntukan perampasan di dalam perjanjian ini, dan mengambil kira juga maksud sebenar s. 75, responden berhak dalam halkeadaan kes untuk membuat rampasan yang dibuatnya itu.

Diputuskan:

[1] Terjemahan yang terhad hendaklah dipakai kepada s. 75 Akta Kontrak 1950. Terjemahan sedemikian hendaklah digunapakai walaupun rangkaikata "whether or nor actual damage or loss is proved to have been caused thereby" didalam seksyen itu adalah terang dan jelas, dan walaupun bahasa yang digunakan di dalam rangkaikata tersebut tidak membataskan ruang operasinya. Menggunapakai terjemahan yang literal akan melangkahi tujuan seksyen berkenaan, yang mana adalah untuk menghapuskan pengasingan di antara penalti dan "liquidated damages". Ia juga akan menghasilkan satu keputusan yang sangat tidak munasabah dengan menukar undang-undang yang ada, dimana seseorang plaintif yang ingin menuntut gantirugi bagi kerugian sebenar yang dialaminya harus membuktikan kerugiannya itu, kecuali dia berpuashati dengan ganti rugi nominal yang simbolik.

[2] Rangkaikata "whether or not actual damage is proved to have been caused thereby" di dalam s. 75 Akta Kontrak 1950 adalah terbatas kepada kes-kes di mana Mahkamah mendapati sukar untuk menilai ganti rugi bagi kerugian atau kehilangan sebenar, berlainan atau berlawanan dengan kes-kes lain, bilamana plaintif di dalam kes-kes tersebut perlu membuktikan kerugian atau pampasan yang munasabah bagi kerugian atau kehilangan sebenar dengan cara biasa.

[3] Ciri-ciri jelas yang ada pada kontrak-kontrak di mana adalah sukar bagi Mahkamah menilai gantirugi bagi kerugian atau kehilangan sebenar ialah kes-kes, di mana tidak terdapat ruang untuk menggunapakai sukatan ganti rugi yang diketahui kepada kes-kes tersebut, tetapi keterangan di dalam kes-kes itu menyerlahkan suatu kehilangan yang jelas, dan kehilangan yang terserlah itu bukan satu kehilangan yang terpencil atau remote. Dalam kes-kes sedemikian Mahkamah tidak memberi ganti rugi yang nominal, tetapi akan memberi satu ganti rugi yang besar tidak melebihi jumlah yang termaktub di dalam peruntukan kontrak. Dalam erti kata yang lain, Mahkamah akan memberi satu jumlah ganti rugi yang munasabah mengikut budi baik dan kesaksamaan Mahkamah.

[4] Di mana terdapat kehilangan atau kerugian sebenar yang jelas terserlah dari keterangan kes, atau dari jenis sesuatu tuntutan, dan ganti rugi bagi kehilangan sebenar itu tidak terlalu terpencil, dan boleh dinilai oleh peraturan-peraturan yang sedia ada terpakai, sebarang kegagalan untuk memajukan keterangan lanjut atau untuk membuktikan kerugian berkenaan, akan menyebabkan ganti rugi bagi kerugian tersebut tidak dibenarkan oleh Mahkamah, walaupun setelah mengambil kira rangkai kata " whether or not actual damage is proved to have been caused thereby" di dalam s. 75 Akta Kontrak 1950.

[5] Di dalam kes semasa, keterangan menunjukkan terdapat kerugian sebenar di mana ganti rugi boleh dinilai mengikut peraturan sedia ada yang terpakai, disebabkan, sebagai contoh, adanya keterangan bahawa perayu telah pun menggunakan peralatan-peralatan perubatan responden. Oleh hal yang demikian, ini adalah satu kes di mana kerugian boleh dibuktikan mengikut peraturan sedia ada yang terpakai, tetapi keterangan tidak dimajukan untuk membuktikan kehilangan sebenar tersebut bagi membolehkan Mahkamah memberi ganti rugi, sebagai pampasan kerana kehilangan kegunaan peralatan perubatan berkenaan. Oleh kerana kerugian tidak dibuktikan tiada apa-apa ganti rugi boleh dibenarkan oleh Mahkamah.

[6] Selain dari kehilangan sebenar, yang tidak dibuktikan, responden berhak untuk merampas wang cengkeram yang munasabah jumlahnya yang telah dibayar kepadanya di bawah perjanjian. Wang cengkeram sebanyak RM12,000 di sini, yang merupakan 10% dari harga belian, bukanlah satu jumlah yang terlau besar bagi menghalang wang tersebut dari dirampas sepenuhnya, dan dengan itu rampasan wang tersebut oleh responden adalah dibenarkan. Oleh yang demikian, bayaran berjumlah RM96,000 hendaklah dipulangkan kepada perayu, setelah ditolak wang cengkeram sebanyak RM12,000.

[Rayuan dibenarkan sebahagiannya].

Cases referred to:
Davies v. Galmoye [1888] 39 Ch. D 323 ***(refd)***
Maniam v. The State of Perak [1957] MLJ 75 ***(refd)***
Bhai Panna Singh v. Bhai Arjun Singh [1972] 1 MLJ 89 ***(foll)***
Linggi Plantations Ltd v. Jagatheeson [1972] 1 MLJ 89 ***(refd)***
Wearne Brothers v. Jackson [1966] 2 MLJ 1955 ***(refd)***
Fateh Chand v. Balkishen Dai [1964] 1 SCR 515 ***(foll)***
Hadley v. Baxendale [1854] 9 Exch. 341 ***(refd)***

Maula Bux v. Union of India [1970] 1 SCR 928 ***(foll)***
Chaplin v. Hicks [1911] 2 KB 786 ***(foll)***

Legislation referred to:
Contract Act 1950, s. 75
Rules of the High Court 1980, O. 28

Other sources referred to:
Indian Contract and Specific Relief Acts by Thomson J

For the appellant - R R Sethu (H S Dhillon with him); M/s. H S. Dhillon & Co.
For the respondent - N. Chandran (Sri Dev Nair with him); M/s. Ram, Rais & Partners

JUDGMENT

Peh Swee Chin FCJ:

This appeal raises a difficult but important question of interpretation of s. 75 of the Contracts Act 1950, which is set out below for ease of reference, (s. 75 is hereafter the section in question):

> Section 75
>
> When a contract has broken, if the sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Both parties are medical practitioners. The respondent, (hereafter the vendor), sold his medical practice on certain terms and conditions under the name and style of "Poliklinik and Surgeri Thiager" to the appellant, (hereafter the purchaser), for a total price of RM120,00 and for this purpose they entered into an agreement in writing on 15 October 1988. The relevant parts of the agreement are set out below:

> The agreement made on this 15 October 1988 ...
>
> Whereas:
>
> Now this agreement witnesseth as follows:
>
> In consideration of the covenants, undertakings and payments set out hereinafter, the parties mutually agree between themselves as follows:
>
> (1) (a) The vendor shall sell the said premises free of all encumbrances to the purchaser for the total of RM120,000 the payment terms being as follows:
>
> i) The purchaser shall pay to the vendor receipt of which the vendor hereby acknowledges by signing this agreement the sum of RM12,000.
>
> ii) The purchaser shall pay the vendor the sum of RM48,000 on or by 27 October 1988.
>
> iii) The purchaser shall pay the vendor fifteen (15) equal monthly instalments of RM4,000 a month on or before the end of each month the first of which fifteen (15) payments is to commence on 30 November 1988.
>
> (2) (a) The vendor as tenant shall continue to hold the tenancy as trustee for and on behalf of the purchaser till the expiry date on 30 November 1989 and if requested by the purchaser shall in accordance with the tenancy agreement renew the said

tenancy. On the expiry of the extended period if there shall not be any clause for further extension the vendor's obligation in this clause shall cease and the purchaser will have full liberty to negotiate a new tenancy but so long as there shall be extensions to the current tenancy the vendor shall continue to hold the same for and to the benefit of the purchaser and to act on the purchaser's instructions.

(b) Both parties represent to each other that they will not do anything to breach the terms of the tenancy and in the event of such breach occurring the party at fault shall and hereby....fully indemnify the other party.

(3) ...

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...

(10) ...

(11) ...

(12) ...

(13) ...

(14) ...

(15) (a) In the event the vendor shall default in his obligations herein the purchaser shall be entitled to specific performance in which event all the costs incurred shall be to the vendor's account.

(b) In the event the purchaser shall default in his obligations herein all monies paid to date of such breach shall be forfeited absolutely to the vendor as agreed liquidated damages and thereupon this agreement shall be deemed null and void and the purchaser shall give up vacant possession of the said premises and shall give us the said practice to the vendor and shall have not further rights whatsoever.

Signed by the abovenamed)
Dr. Thiagrajah a/l Retnasamy) signed
the said vendor in the presence of)

signed
KB Thuraisingam
Advocate & Solicitor
Kuala Lumpur

Signed by the abovenamed)
Dr. Selva Kumar a/l Murugiah) signed
the said purchaser in the presence of)

signed
KB Thuraisingam
Advocate & Solicitor
Kuala Lumpur

The premises where the clinic is situated have, at all material times, belonged to a third party who had earlier granted a tenancy of the same to the vendor, who, after and under the agreement dated 15 October 1988, was "to hold the tendency as trustee for and on behalf of

the purchaser ...", *vide* its clause 2 but the rent payable would be paid by the purchaser after the date of the said agreement to the vendor who would then in turn pay to the vendor's landlord.

RM12,000 was paid on the signing of the agreement by the purchaser who was to pay a further sum thereafter in pursuance of the agreement leaving some balance to be paid by 15 monthly instalments of RM8,000 each. Susbsequently, to cut the story short, thus, sometime before 22 December 1989, the purchaser refused to go on paying the monthly instalments, leaving 6 instalments unpaid (RM24,000) and by then, a sum of RM96,000 had been paid by the purchaser to the vendor towards the aforesaid purchase price of the clinic. At that time the purchaser had also failed to reimburse the vendor the rent payable to the extent of RM4,808.

On 22 December 1989, the vendor wrote to the purchaser through his solicitors, terminating the said agreement, forfeiting the sum of RM96,000 and requiring the purchaser to hand over the medical equipment and vacant possession of the premises of the clinic.

The originating summons herein was subsequently filed, claiming declarations that the said agreement was terminated, that the vendor was entitled to forfeit the sum of RM96,000, that in regard to the tenancy which the vendor held in trust be terminated and that the vendor be entitled to resume vacant possession of the clinic.

Apart from the important interpretation of the section in question, they are several small points which may be very well briefly disposed of first.

The first of such small points is to the effect that the purchaser was induced to enter into the said agreement by the misrepresentation from the vendor about the average monthly income of the clinic from the source of the "contract-patients" being at RM5,000 but the purchaser alleged that the actual income earned was half of the sum. This bare allegation was made by the purchaser apparently in order to explain the refusal or reluctance to go on paying the aforesaid monthly instalment.

However, *inter alia*, no particulars at all were given in respect of such patients for the period from the date of the agreement in question. It was a mere allegation, equivocal, inconsistent, and insubstantial for reasons mentioned by the learned Judge that compelled him to reject it. We are satisfied that the learned Judge has not erred in doing so. We also reject such allegation.

Yet another mundane point is to the effect that the learned Judge has failed at the outset to make an order under O. 28 of the Rules of the High Court 1980 to direct that the proceeding by the originating summons herein be continued as if it were begun by writ to determine the issue of misrepresentation.

The purchaser at the hearing before the learned Judge was represented by Counsel. He never raised this procedural point at all. An appellant could be barred from rasing an objection to a point of procedure on appeal when such objection was not raised in the Court below. Please *Davies v. Galmoye* [1888] 39 Ch. D. 323. By the same token, the purchaser as appellant should be also barred from raising the procedural point in question, quite apart from the fact that his procedural point proved to be futile with hindsight.

It is also desirable to mention two other matters *viz* that the question of arrears of rent has not been submitted on by both parties before us and the Court is therefore prepared to treat

this as being no longer an issue before us and that it was common ground in the Court below, that the purchaser began to fail to pay those monthly instalment towards the purchase price as form July, 1989.

We now deal with the question of concern, i.e. the section in question and the facts that call for its interpretation in this case are as follows. A total sum of RM96,000 was collected by the vendor from the purchaser to account of the total purchase price of the clinic, leaving a sum of RM24,000, the amount of 6 monthly instalments remaining unpaid. On 22 December 1989, the vendor wrote, *inter alia*, in effect, terminating the agreement, on the ground of failure to pay the balance of RM24,000, and stating that the said sum of RM96,000 had been forfeited absolutely as "agreed damages". This must have reference to clause 15 of the agreement as set out above.

We have long known the object for which the section in question was enacted first in India and later here in our country. Thomson J (as he then was) in *Maniam v. The State* [1957] MLJ 75, commenting on arguments advanced before him as to whether a certain sum was to be regarded either as a penalty or as liquid damages, said:

> In the first place, in this country there is no difference between penalty and liquidated damages. Section 75 of the Contract Ordinance which is the same as s. 74 of the Indian Contract Act reads as follows:
>
> When a contract has been broken, ... not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> As is said in Pollock and Mulla on the Indian Contract Act (7th Edition, page 410). This section boldly cuts the most troublesome knot in the Common Law doctrine of damages. In brief, in our law in every case if a sum is named in a contract as the amount to be paid in case of breach it is to be treated as a penalty. See *Bhai Panna Singh v Bhal Arjun Singh* AIR [1929] PC 179

It is obvious that any submission as to whether a certain clause in a contract is a penalty or liquidated damages is an exercise in futility. Clause 15(b) of the agreement before us is therefore unenforceable and is to be regarded as a penalty, void in equity for being unconscionable.

At common law, where there is no such section in question, the effect of a sum being found as a penalty, is therefore that the innocent party to a breach of contract is not left with no remedy, he can still recover damages or compensation which he has however to prove, and it is immaterial that such compensation if proved, exceeds or not, the stipulated penalty.

However, the wording of the section in question seems to also differ from the common law on the aspect of proof of damages when a provision in a contract turns out to be a penalty. The relevant words in the section in "question are the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby to receive etc. reasonable compensation not exceeding the amount so named etc. the penalty stipulated for." (The quoted words will be hereafter the expression in question).

In particular, from the expression In question, the words, "whether or not actual damage or loss is proved to have been caused thereby", (they are hereafter the words in question) , are unambiguous and plain, and by the primary rule of construction i.e. literal construction of the same, they may seem to indicate clearly the dispensation of proof of actual damage or loss by an Innocent party to a breach of contract; and this seems to be a departure from the common law brought deliberately about by the legislature. Let us examine the acceptability of this construction. It is useful to bear in mind there is no such thing as a fixed hierarchy

of application of rules of construction in which the primary rule of literal construction will be at the top of it.

In the first place, such a literal construction would seem to be beyond the object of the section in question *viz*. the abolition of the distinction between a penalty and liquidated damages; secondly it will produce a most unreasonable result in that it will change the existing law which is that if a plaintiff seeks to recover damages for the actual damage caused, he ought to prove them, unless he is content with the symbolic award e.g. of nominal damages for any infraction of his rights under a contract. This even seems to be a rule of some antiquity.

We hold first, that the literal construction should not be strictly adhered to and the words in question should be given a restricted or limited construction though the language used in the words in question expresses really no circumscription of the area of operation.

Having decided on a more limited construction of those words in question, we must now revert, at least briefly, to the more important and relevant cases in our own Courts and Privy Council, and the Indian Supreme Court to decide for ourselves how precisely the words in question should be construed.

In *Bhal Panna Singh v Bhai Arjun Singh, supra*, an Indian appeal in the Privy Council, in connection with a provision in a contract for the party in breach later to pay Rs10,000, Lord Atkin said in connection with s. 74 of the Indian Contract Act, (corresponding to the section in question in our Act), held: "The effect of s. 74 of the Contract Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs10,000, whether the penalty or liquidated damages. The plaintiffs must prove the damages they have suffered". In that case, the plaintiffs managed to prove as their actual damage, the sum of Rs500 which they recovered.

Lord Hailsham In *Linggi Plantations Ltd v Jagatheeson* [1972] 1 MLJ 89 observed that the section "was intended to cut through the rather technical rules of English law relating to liquidated damages and penalties..."

In *Maniam v State of Perak, supra*, the object of the section in question suggested by Pollock & Mulla, the Joint authors of "Indian Contract and Specific Relief Acts", was repeated by Thomson J., (as he then was) with approval as set out above, but unfortunately the section in question was found by his Lordship to be irrelevant to the facts of that case and consequently there was no expounding on the words in question.

The view of Lord Atkin was adopted in our High Court case, *viz Wearne Brothers v. Jackson* [1966] 2 MLJ 1955, though the learned trial Judge, while correctly holding that, in a provision in a contract amenable to the section in question, the plaintiffs must prove damages they had suffered, erred in saying further that "unless the sum ... is a genuine preestimate". It must be remembered that the expression, "liquidated damages" is the name for the contracting parties' supposedly genuine preestimate of the loss to the innocent contracting party when the contract is broken by the other. Every such provision to which the section in question is applicable is to be regarded effectually as a penalty and therefore void or unenforceable.

The Indian Supreme Court in two leading cases, adopted the view of Lord Atkin in *Bhai Panna Sincih supra*, that a plaintiff must prove the actual damage ie. must prove the damages for the actual damage or loss, despite those words in question. The two Indian Supreme Court cases are cases in which the interpretation of this section in question was not a side-show as in most of other cases mentioned, but was the main prominent issue discussed and dealt with. It will be necessary to set out the gist of them.

The first of these two cases is *Fateh Chand v Balkishen Das* [1964] 1 SCR 515. This case concerns a sale of land for the price of Rsl2l,500. Rsl,000 was paid as earnest money. A part payment of Rs24,000 was further paid whereupon the possession of the land was given by the vendor to the purchaser. The section in question was the issue before the Court.

The case was heard before a subordinate Judge and on appeal against his decision to the High Court, the High Court allowed the appeal and held that the purchaser was in breach of contract for failing to pay the balance of the purchase price. There was a clause providing for forfeiture of all money paid for breach by the purchaser. The High Court however, ordered the purchaser to pay only a sum equivalent to 10% of the purchase price as reasonable compensation, under the section in question in addition to and apart from the forfeiture of the sum of Rs1,000 being earnest money paid on signing the agreement. The High Court made also orders for payment of mesne profit for use of the land and for redelivery of premises of the land to the vendor.

The Supreme Court of India held that reasonable compensation should be awarded "to make good loss or damage which naturally arose in the usual course of things or which the parties knew when they made the contract, to be likely to result from the breach". It cannot be lost on the mind of anybody that the Indian Supreme Court was re-asserting the celebrated ratio in *Hadley v Baxendale* [1854] 9 Exch. 341. The Indian Supreme Court further found the award of the sum equivalent to 10% of the purchase price by the High Court as being an arbitrary assumption based on no principle they could find. The Supreme Court then went about their way to ascertain apparently, the reasonable compensation by looking at the evidence to find if there was any loss other than the loss suffered by being kept out of possession. The Supreme Court found no evidence of depreciation of the value of the land in question there. The Indian Supreme Court found that there was absence of proof of damage but stated that the forfeiture of earnest money and the advantage of having the use earlier of Rs24,000 as being sufficient compensation. The Indian Supreme Court did not in effect in reality therefore award any distinctly and separately "reasonable compensation" under the section in question despite what might be regarded as a mere consolatory statement just mentioned, with the greatest respect.

The ratio of the case seems to be that such "reasonable compensation" must be proved according to the usual principles, and the Court undertakes a consideration of. the evidence adduced to see if there is any such proof or such evidence of such actual damage or loss. If there is no such evidence, there will be no award of such reasonable compensation. This ratio seems to be in accord with the view of Lord Atkin set out above.

The second case is *Maula Bux v Union of India* [1970] 1 SCR 928. There, Bux agreed to supply certain foodstuffs to some military headquarters and deposited Rs18,500 with the Indian Government. The contract provided that for failure by Bux to perform it, the sum of Rs18,500 "would stand forfeited and be absolutely at the disposal of the Government without prejudice to any other remedy or action that the Government may have taken".

Bux failed to perform the contract and the sum of Rsl8,500 was forfeited. Bux sued for the return of the sum. The Subordinate Court ordered the return on the ground that the Government had not suffered any loss. The Government appealed to the High Court. The High Court allowed the appeal and allowed the Government to retain the sum on the ground that the sum might be regarded as earnest money. Bux appealed to the Supreme Court. The Supreme Court disagreed that the sum was earnest money and held to the effect that the

sum was not a reasonable amount as earnest money, so that the sum would fall within the section in question. The Supreme Court ordered the refund to Bux of the sum with the interest at the rate of 3% from date of action to date of satisfaction. *Fateh Chand* was clearly affirmed.

With regard to the words in question, the Supreme Court held that the Government must prove the loss and thus could have produced but failed to produce evidence to prove the prices of the said foodstuffs in question when Bux falled to deliver them.

But what is far more interesting in that case is that the Indian Supreme Court, when referring to the words in question, ie. "whether or not actual loss or damage was proved to have been caused thereby" stated that the words in question were intended to cover 2 kinds of contracts. In the first kind, the Court would find it very difficult to assess such reasonable compensation. In the second kind, the Court could assess such reasonable compensation with settled rules. Such dichotomy of contracts by the Indian Supreme Court represents, in our view, a logical basis for the words in question, words added by the legislature to the section in question without seemingly any thoughtfulness about the desirability of some appropriate limitations thereto. We agree with the Indian Supreme Court's dichotomy of such contracts.

Secondly, we therefore further hold that the words in question *viz*. "whether or not actual damage was proved to have been caused thereby", are limited or restricted to those cases where the Court would find it difficult to assess damages for the actual damage or loss as distinct from or opposed to all other cases, when a plaintiff in each of them will have to prove the damages or the reasonable compensation for the actual damage or loss in the usual ways.

However, there remains to be done further work, for their Lordships in the Indian Supreme Court did not further identify or elaborate the contracts of the kind for the breach of which the Court finds it difficult to assess damages or "the reasonable compensation" for actual loss or damage. The search will have to continue for the precise attributes of this kind of contract.

Conceivably the archetype of cases of the kind just mentioned, in our view, is undoubtedly the well-known case of *Chaplin v Hickso* [1911] 2KB 786. In that case Miss Chaplin, an actress agreed with Hicks, a theatrical manager, for Miss Chaplin to be at a meeting for him to interview her and also 49 other actresses where he would select 12 out of such 50 actresses for giving remunerative employment to. He was in breach of contract for not giving Miss Chaplin a reasonable opportunity to attend the interview. It was also argued for him in the Court of Appeal that only nominal damages were payable and the award for substantial damages by the High Court was wrong. The submission of nominal damages was to the effect that she would have had only a chance of one in four of being successful, a chance which itself further depended on the imponderables. The argument for nominal damages was rejected by the Court of Appeal and the High Court's award was upheld.

Very clearly Miss Chaplin failed to prove the damages for the actual damage ie. the amount for such damage or loss, and one may query as to why she should be given substantial damages and not merely nominal damages as would have been seemingly and normally the case. We feel we ought to explain even further below.

A few words may first be necessary to explain the nature of nominal damages, which are damages, say RM10, (traditionally of about 40 shillings in England) , which could be awarded

in each and every breach of contract, in the absence of actual loss or damage, inherently in such a case, or alternatively in the absence or failure of proof of such actual loss or damage.

To revert to the poser above about Miss Chaplin, basically, the evidence in Miss Chaplin's case indubitably suggested a real loss, a loss that was not too remote, going by the rules in *Hadley v Baxendale* [1854] 9 Ex. 341 but at the same time it was quite difficult to assess the damages or the amount of money that should be given to her for such loss of such opportunity to be selected.

In a good number of cases, rules for quantifying amounts of money for damages have evolved in Courts for some but not all types of cases, in other words, a measure of damages for some of these cases has been respectively established eg. the measure of damages in a sale of goods being the difference between market value and contract price etc. However, a measure of damages i.e. a settled rule for assessing damage, has not been developed for cases of the type of Miss Chaplin's and such measure for her case has still not been established, it would still be left to the good sense and fair play of the Court to fix a reasonable amount as compensation. Thus, it will mean that for lack of an established measure of damages in any particular case, that case will be one in which the Court finds It difficult to ascertain the amount of actual loss or damage. The Court will not shirk its duty, however, when such actual loss or damage is manifested from the evidence and it is not too remote, to find a reasonable sum for the plaintiff.

It is significant to add that there are cases of contract in which evidence therein shows there can be no real loss inherently and in such event, nominal damages will be the only damages for a judgment obtained by a successful plaintiff either to use it "as a peg to hang his costs on", or to establish a right or a declaration of right. It is not difficult to Imagine such a case when the evidence shows clearly there can be no real loss.

For illustration, for such a case clearly showing no real damage or loss where nominal damages would be the only remedy, let us say, eg. that A, a doctor promises to examine the next day, B, a regular patient of his, who is very keen to have A examine him routinely on the following day, A fails to do so the next day. Here A is in breach of contract; but the evidence here clearly shows no actual loss or damage. Whether in any particular case the evidence shows any real damage or not appears to be largely a matter of common sense.

Thirdly, therefore, we hold that the precise attributes of such contracts in which it is difficult for a Court to assess damages for the actual damage or loss are cases where there is no known measure of damages employable, and yet the evidence clearly shows some real loss inherently and such loss is not too remote, then the Court ought to award, not nominal damages, but instead, substantial damages not exceeding the sum so named in the contractual provision; a sum which is reasonable and fair according to the Court's of good sense and fair play.

Fourthly, we hold that in any case where there is inherently any actual loss or damage from the evidence or nature of the claim and damage for such actual loss is not too remote and could be assessed by settled rules, any failure to bring in further evidence or to prove damages for such actual loss or damage, will result in the refusal of the Court to award such damages despite the words in question.

Having expressed our views above, we now deal with the facts in the instant case before us. The evidence shows clearly some actual loss, damages for which could be assessed by settled rules. The purchaser e.g. was using the medical equipment. This is therefore a case where damages could be proved by settled rules. But the vendor has brought no evidence

to prove damages for the actual loss as explained earlier, thus eg. we could have awarded at least some damages as compensation for loss of use of the medical equipment from some evidence of its rental value should it be rented out. Thus the real damage cannot be quantified, in other words, the damages have not been proved. The sum of RM96,000 paid towards the purchase price, less the sum comprised therein which was paid as earnest money, would have to be refunded to the purchaser by the vendor subject to what is to be further said below about the sum representing the earnest money or the deposit.

Apart from the real loss, (which has not been proved), the vendor ought to be entitled, in any event, to forfeit any reasonable amount of earnest money or deposit. We have in our case the deposit or earnest money, ie. the sum of RM12,000 which was paid on signing the agreement by the purchaser to the vendor, see clause l(a)(i) of the agreement. The sum is equivalent to 10% of the purchase price and is part of the said sum of RM96,000 sought earlier to be forfeited by the vendor by clause l(a)(i) of the agreement.

The sum of RM12,000 in all the circumstances of this case is not too large to prevent it from being fully forfeitable. We would not interfere with it and would allow the vendor to forfeit it or keep it.

We therefore allow the appeal in part by ordering the respondent to refund forthwith the sum of RM96,000 less the sum of RM12,000 i.e. to refund the sum of RM84,000 and to pay 8% p.a. as interest thereon from the date of judgment to the date of satisfaction. The order of the High Court below dated 8 November 1991 is to be varied accordingly to take account of the said refund and interest thereon. The respondent is to pay costs of appeal here but costs in the Court below remain payable by the appellant.